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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN SYLVESTOR CRAWFORD, Defendant and Appellant.	B289989 (Los Angeles County Super. Ct. No. MA072760)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed and remanded with directions.

Law Offices of Linnea M. Johnson and Linnea M. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant John Sylvestor Crawford (defendant) appeals from his attempted robbery conviction. Defendant contends that the trial court abused its discretion in denying his petition to unseal juror information, in admitting evidence of an uncharged crime, and in denying his motion to dismiss an allegation of a prior conviction alleged under the "Three Strikes" law. Defendant also requests that we remand for resentencing due to recent amendments to Penal Code sections 667, subdivision (a)(1),[1] and 1385, subdivision (b), and that we order the trial court to conduct a hearing on defendant's ability to pay restitution fines and court fees. We conclude that defendant failed to preserve his claim of inability to pay fines and that a remand solely on the question of ability to pay fees would be futile. We grant defendant's request to remand the matter to give the trial court the opportunity to exercise discretion under the recently amended sections 667, subdivision (a)(1), and 1385, subdivision (b). However, finding no merit to defendant's other claims of error, we affirm the judgment of conviction.

BACKGROUND

Defendant was charged in an amended information with attempted robbery in violation of sections 211 and 664. The information also alleged that defendant had suffered two prior robbery convictions which qualified as serious felonies under section 667, subdivision (a)(1), and within the meaning of sections 667, subdivisions (b) though (j), 667.5, subdivision (c), and 1170.12, subdivision (b) (the Three Strikes law). In addition, the information alleged pursuant to section 12022, subdivision (b)(1) that defendant personally used a knife in the commission of the

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

offense.[2] After defendant was convicted of attempted second degree robbery, he waived his right to a jury trial on the prior conviction allegations. After trial, the court found the allegations to be true.

On May 10, 2018, the trial court sentenced defendant to prison for a term of 25 years to life pursuant to the Three Strikes law, plus two consecutive five-year enhancements for the prior serious felony convictions. The court also found defendant to be in violation of probation in Los Angeles County Superior Court case No. MA059723, and sentenced him to a consecutive prison term of 10 years. The court ordered defendant to pay a restitution fine of $3,000, a parole revocation fine in the same amount and stayed, a criminal conviction fee of $30, a court security fee of $40, and a crime prevention fee of $10.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Current Offense

Rodolfo Cabral Salas (Cabral Salas) testified that on November 26, 2017, around 4:20 p.m., he was walking alone on Palmdale Boulevard near Avenue Q-7 and 4th Street. As he was turning onto 4th Street, a dark blue, four-door Saturn car with dark tinted windows suddenly stopped next to him. The driver, a stranger to Cabral Salas, got out, followed him, and yelled, "Hey, what's up? I want your wallet and your phone." Cabral Salas ignored the man and continued walking, repeatedly looking back over his shoulder. When the man came within eight feet of Cabral Salas, he put his hand in his pocket, reaching for what

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[2] The section 12022, subdivision (b)(1) allegation was dismissed on the motion of the prosecutor during trial.

Cabral Salas thought was a knife. Frightened, Cabral Salas called 911, as the man ran toward Avenue Q7. A second man who had been in the car, at some point got out and remained near the car until the first man ran away. The second man then got into driver's seat, made a U-turn, and drove toward Avenue Q7 as Cabral Salas ran home.

In the 911 call Cabral Salas described both men as Black, and the man who approached him as about 25 years old, wearing black pants and a white shirt with black lines. He described the car as blue, four-door, possibly a Saturn. At trial, Cabral Salas described the man as 20 to 25 years old, Black, thin, taller than he, with short black hair.[3] In court he identified defendant as the would-be robber.

Los Angeles County sheriff's deputies responded to the 911 call. Cabral Salas testified that he spoke with the deputies but did not tell them that he actually saw what the man had reached for, and he denied having described a knife to them, blaming any misunderstanding on his limited proficiency in English. On December 2, 2017, deputies took him to the station to look at two photographic lineups of six individuals each. Cabral Salas selected defendant's photograph from one of the photo arrays, but did not identify anyone in the other. He recognized defendant from his face and hair.

Deputy Cesar Vilanova testified that on December 2, 2017, he assisted other deputies who had detained defendant. When Deputy Vilanova arrived at the scene, defendant was seated in

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[3] Cabral Salas testified that he is 5'6" and weighs 160 pounds. Defendant was then about 6'1" tall and weighed approximately 178 pounds.

the driver's seat of a blue Saturn four-door sedan. A Black male adult sat in the front passenger seat and a Black female adult sat in the rear passenger seat.

2013 robbery

John Summers (Summers) testified that in May 2013, he was living in Palmdale near 20th Street East and Avenue Q-6. From his front yard, he had a view of the grocery store parking lot across the street about 40 to 50 feet away. Around 4:00 p.m. on May 26, 2013, Summers was in his front yard, when he saw a struggle between a woman and a Black man in his teens or early 20's, who appeared to be trying to steal the woman's purse in the store parking lot. The man grabbed the woman's arm, punched her with his fist, took her purse, and then ran toward the block wall on Avenue Q-4 as the woman screamed. Summers watched the man jump the block wall and run behind Summers's house. Summers yelled for his roommates, who then started looking around the backyard. Neighbors came out and also started looking for the man. About 15 minutes later, Summers saw a Suburban SUV moving very slowly eastbound on his street, near the curb. It stopped two or three houses away from his and he saw the rear passenger door open. Summers then saw the robber emerge from nearby bushes and get into it. Summers also saw another passenger in the car. The car then backed up, made a U -turn, and quickly drove off. Sheriff's deputies then arrived and took him to identify a car they had stopped. Summers was able to identify only the Suburban, and was unable to identify the suspect.

Detective Michael Deschamps was dispatched to the Avenue Q-6 robbery scene described by Summers. The detective testified that the call included the description of a blue Suburban

with high profile chrome rims. Enroute to the crime scene he saw a car matching that description. He conducted a felony traffic stop and detained defendant and two juvenile occupants of the car. Detective Deschamps searched the car and found a woman's black purse containing an identification card in the name of the victim. When he arrived at the crime scene, he met the victim who was upset and disheveled, with redness and swelling on the left side of her face. Defendant was later convicted of second degree robbery in that case, and placed on five years of felony probation.[4]

Defense evidence

Deputy Ivan Brenes spoke to Cabral Salas on November 26, 2017, first in English and then in Spanish. Cabral Salas said that a Black man, 20 to 25 years old, got out of the passenger side of a blue vehicle, retrieved a folding metal knife from his front right pocket, displayed it to Cabral Salas, and then demanded his wallet and cell phone. Cabral Salas observed a different Black man of unknown age driving the blue vehicle, but would not be able to identify either man if he saw him again. Later, Deputy Brenes translated the standard photographic lineup admonition into Spanish for Cabral Salas.

DISCUSSION

I. Disclosure of juror information

Defendant contends that the trial court abused its discretion in denying his petition to unseal juror information

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[4] Throughout his briefs, defendant refers to the 2013 robbery merely as a "purse-snatching." However, purse-snatching by force or fear is robbery. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257.) "*Any* robbery" is by law a violent felony. (§ 667.5, subd. (c)(9).)

after he provided evidence that one of the jurors was not a citizen of the United States, was not proficient in English, was a convicted felon, and slept through much of the deliberations.[5]

A petition for the release of personal juror identifying information must be supported by a declaration of facts sufficient to establish good cause for disclosure. (Code Civ. Proc., § 237, subd. (b).) A prima facie showing may justify an evidentiary hearing regarding good cause. (*Ibid*.) Good cause means facts that support a reasonable belief that jury misconduct occurred, "'and that further investigation [was] necessary to provide the court with adequate information to rule on a motion for new trial. . . .' [Citation.]" (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093-1094, quoting *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; Code Civ. Proc., § 206, subd. (g).)

"Discovery of juror names, addresses and telephone numbers is a sensitive issue which involves significant, competing public-policy interests." (*People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 548.) "Trial courts have broad discretion to manage these competing interests by allowing, limiting, or denying access to jurors' contact information. [Citations.]" (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 380.) A trial court's "discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

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[5] Noncitizens of the United States, those insufficiently proficient in English, and convicted felons are not qualified to sit as jurors. (Code Civ. Proc., § 203, subd. (a).)

Defendant's petition was based on information given to defense counsel that the verdict was essentially a compromise, reached only in an attempt to prevent the jury from being hung. The petition was supported by defense counsel's declaration that she had spoken to three jurors, one of whom provided contact information; that the same juror left a voicemail for defense counsel the evening after the verdict, stating that another juror said in Spanish that he was not a United States citizen and was a convicted felon.

On appeal, defendant does not challenge the trial court's denial of the petition insofar as it was based on the ground that the jury agreed to a compromise verdict. Nor did defense counsel press that issue at the hearing on the petition. Instead she argued that good cause was shown by evidence of juror misconduct. Defense counsel's declaration set forth the voicemail message received from Juror No. 7 on the evening the verdict was entered:

> " . . . evening of March 16, 2018, at almost 8 p.m., this juror left me a voicemail expressing further concerns over the deliberations in that one of the jurors stated he was not a U.S. citizen and has felonies; this was apparently stated in Spanish."

An email regarding Juror No. 7's communication with the Jury Services Division was described in the declaration as follows:

> "On March 22, 2018, this juror informed the Jury Services Division of this information and added that he refused to participate in jury deliberations, slept through discussions, and required other jurors to translate discussions into Spanish for him. This information was disclosed to the Court and copies of

> the emails related to the issue were provided to the Court and attorneys. (See EXHIBIT A.)"

Exhibit A contained copies of several emails, that which is relevant to this issue was from Melinda Butler, identified in the email as a Court Services Assistant, sent to a Maisha Elie, who was otherwise unidentified, and stated in relevant part:

> "Yesterday, a juror . . . questioned if jurors had to be a citizen. She then said, one of the deliberating jurors disclosed that he was not a citizen and that he was a felon. She also said, he refused to participate in the deliberations and slept through most of the discussions and was having the other jurors translate in Spanish to him what they were discussing. [¶] The Jury Foreman did not address this with the court . . . . The . . . Juror did say the verdict was 11/1 and she was the one . . . ."

Although defense counsel had Juror No. 7's contact information, no declaration was submitted from Juror No. 7.

The prosecutor's declaration in opposition to the petition, set forth that she had spoken to five jurors after the jury was discharged. In addition to addressing the compromise-verdict issue, the prosecutor spoke to Juror No. 7 in the presence of defense counsel, and Juror No. 7 said she had been the holdout juror before the unanimous verdict was reached, but explained that she determined her doubt was unreasonable after reviewing evidence. The prosecutor attached a copy of the report prepared by a defense investigator, summarizing an interview with Juror No. 7 in which the juror was identified as one who had alleged that another juror could not speak English, was a felon, and was not a citizen.

The court concluded there was insufficient cause to release juror information. Defendant appears to construe the trial court's findings as indicating that the petition sought only the contact information for Juror Nos. 7 and 11. He argues that because Juror No. 7 had voluntarily provided her contact information, the petition was moot as to her, and argues that there was no evidence to support the trial court's presumption that Juror No. 11 was the "other juror." Defendant concludes that the trial court should be required to unseal *all* the jurors' information so that they can be interviewed "in order to identify the 'other juror' and confirm or dispel the allegations Juror No. 7 has made."

In fact, the "other juror" was identified by Juror No. 7 when she gave the defense investigator the accused juror's first name. It is apparent from the court's comments that it had reviewed the report and the voir dire transcript. We thus reject defendant's suggestion the trial court was merely *assuming* Juror No. 11 was the juror described by Juror No. 7. There was thus no need to question all the jurors to discover the identity of the juror whom Juror No. 7 accused of misconduct.[6]

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[6] Juror No. 7 had been accused of misconduct during deliberations. The jury foreman reported to the court that Juror No. 7 had attempted to read notes that she had made on her phone the previous night. The court questioned all but four of the jurors individually, including Juror No.7, who admitted that she had made handwritten notes at home, and because she left those notes in her car, she put them on her cell phone. Juror No. 7 stated that she did not intentionally disobey the court's instructions, and that the other jurors had been disrespectful toward her. The trial court found that Juror No. 7 had violated the court's instructions, but the violation was unintentional. The

Moreover, we do not construe the trial court's findings and ruling so narrowly. The petition requested the unsealing of the jurors' contact information without limitation to particular jurors. The trial court ultimately denied the petition without limitation. The trial court found that defendant had failed to show good cause, by competent evidence, to support Juror No. 7's allegations of misconduct, and thus denied defendant's request to unseal or set a hearing. Implied in the court's ruling is that defendant's showing was insufficient to support a reasonable belief that jury misconduct occurred or to support prima facie showing of good cause to hold an evidentiary hearing.

The court noted that although defense counsel had Juror No. 7's contact information, she submitted no affidavit or statement directly from Juror No. 7. The court also noted that in voir dire there was no indication that language was a barrier for Juror No. 11. The court stated that Juror No. 11 had lived in West Palmdale for 30 years and was married with two children, one a medical student, the other a psychology student, that all communication was in English, and that there was nothing to indicate that he did not understand. In addition, the trial court observed that although the other jurors had been able to come forward with questions and to report perceived misconduct by Juror No. 7, none of them at any time indicated that a juror was not deliberating, could not speak English, was a convicted felon, or was not deliberating. The court concluded that there was no

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court also found that the jurors had behaved respectfully, that Juror 7 was not "being targeted," and concluded that an admonishment not to use electronic devices was the appropriate remedy.

competent evidence supporting Juror No. 7's claims about the other juror's status, and denied the petition.

Defendant argues that the hearsay nature of the evidence regarding Juror No. 7's claims does not preclude a finding of good cause. He relies on the following language in *People v. Johnson* (2013) 222 Cal.App.4th 486, at pages 493 and 494:

> "A juror's out-of-court statement that misconduct occurred, when offered in support of a motion for disclosure, is not offered for the truth of the matter asserted; thus it is not hearsay. It is simply used to show good cause to contact *the juror*. Once *the juror* is contacted, if the juror confirms the misconduct, the juror's testimony can be used to support a motion for new trial." (Italics added.)

The quoted language merely states that a juror's hearsay statement can provide good cause to disclose that juror's contact information; however, as defendant makes clear, he did not need Juror No. 7's contact information. Moreover, defendant did not simply submit Juror No. 7's statement, as his argument suggests. Rather, defense counsel recounted Juror No. 7's hearsay statement describing alleged statements made by Juror No. 11. A second layer of hearsay.

Defendant also claims that the trial court improperly made a credibility determination when it considered the fact that no other juror made the same claims of juror misconduct, despite having no difficulty in asking questions or reporting other suspected misconduct. Relying on *People v. Johnson* (2015) 242 Cal.App.4th 1155 (*Johnson II*), defendant contends that he was required only to make a *prima facie* showing of good cause, and he refers to *Johnson II*'s statement that "[n]ormally . . . a 'prima facie showing' connotes an evidentiary showing that is made

without regard to credibility." (*Id*. at p. 1163.) As the *Johnson II* court explained, credibility is not considered because "the prima facie showing merely triggers an evidentiary hearing, at which any necessary credibility determinations can still be made. [Citation.]" (*Id*. at p. 1163.) It is defendant's burden to demonstrate that the trial court abused its discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Nothing in the record indicates that the trial court did not believe defense counsel, who was the only witness whose declaration was presented in support of the petition. Rather, the trial court found that since defendant had Juror No. 7's contact information but failed to provide an affidavit or other competent evidence directly from Juror No. 7, the facts alleged were too speculative to support a reasonable belief that jury misconduct occurred.[7] Good cause for disclosure does not exist where allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (See *People v. Wilson* (1996) 43 Cal.App.4th 839, 852.)

The trial court denied the petition to unseal the juror information and declined to set a hearing. Implied in the ruling is a finding that defendant had failed not only to show good cause for disclosure, but also failed to make a prima facie showing of good cause to hold an evidentiary hearing. Defendant's arguments do not demonstrate otherwise. As the *Johnson II* court also explained, "'a prima facie showing refers to those facts demonstrated by admissible evidence, which would sustain a favorable decision *if the evidence submitted by the movant is*

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[7] We observe that although defense counsel's declaration set forth that the accused juror spoke Spanish when he said that he was not a citizen and was a felon, she did not assert that Juror No. 7 understood Spanish.

credited.' [Citation.]" (*Johnson II*, *supra*, 242 Cal.App.4th at p. 1164, fn. omitted.) Defendant submitted only the declaration of defense counsel, and as respondent observes, "the critical inquiry was whether all the evidence before the court established a reasonable belief the allegations of misconduct were true, not whether they were merely uttered by Juror 7." Under such circumstances, we do not find that the trial court's exercise of discretion was arbitrary, capricious or patently absurd, and thus discern no abuse of the trial court's broad discretion.

II. Evidence of uncharged crime

Defendant contends that the trial court abused its discretion in allowing the prosecution to admit evidence of the robbery he committed in 2013 to prove defendant's identity as the perpetrator in this case and his intent to steal from Cabral Salas. Defendant further contends that admission of the evidence resulted in a denial of his right to a fair trial under the United States and California Constitutions.

"'Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.' [Citation.] 'Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after

weighing the probative value against the prejudicial effect. [Citation.]' . . . [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668, fn. omitted.) The evidence of uncharged crimes must be sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Kipp* (1998) 18 Cal.4th 349, 369, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*). However, the prior and current crimes need not be identical. (See *People v. Harris* (2013) 57 Cal.4th 804, 842.) The greatest degree of similarity is required when the purpose of the evidence is to prove identity, whereas a lesser degree of similarity is required when the issue is common design or plan, and the least degree of similarity is required when the issue is intent. (*People v. Kipp*, at pp. 370-371.)

"'"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." [Citation.]' [Citation.]" (*People v. Fuiava*, *supra*, 53 Cal.4th at pp. 667-668.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.) It is the appellant's burden to establish an abuse of discretion. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566.) As defendant did not make a constitutional argument below, we do not reach his due process claim unless and until he establishes error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444.)

The trial court allowed evidence of defendant's 2013 robbery and not evidence of the 2002 robbery, finding that although the 2002 robbery was similar, it was remote. The court admitted the evidence of the 2013 robbery as probative of intent, common plan or scheme, and identity.

Defendant first contends that the trial court's ruling that the evidence was admissible for all three cited purposes was an abuse of discretion, because the trial court did not ask the defense to stipulate that intent and common plan would not be contested. If the court had taken such a stipulation, defendant argues, the instruction regarding uncharged crimes (CALCRIM No. 375) would have instructed the jury to consider the evidence solely on the issue of identity. Defendant offers no authority that requires a sua sponte demand for such a stipulation. "The circumstance that the defense might have preferred that the prosecution establish a particular fact by stipulation, rather than by live testimony, does not alter the probative value of such testimony or render it unduly prejudicial." (*People v. Carter* (2005) 36 Cal.4th 1114, 1169.) It follows that the trial court had no sua sponte obligation to request a stipulation. And as respondent argues, because the prosecution could not be required to accept such a stipulation, it also follows that there is no such sua sponte obligation. (See *People v. Rogers* (2013) 57 Cal.4th 296, 329.)

Defendant contends that the evidence was cumulative and not relevant to prove intent because the person who approached Cabral Salas immediately demanded his wallet and phone, thereby establishing his intent to steal. Respondent counters that a defendant's not guilty plea places all issues in dispute, making intent a material fact. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 796.) However, "admission of other crimes evidence cannot be justified merely by asserting an admissible purpose. Such evidence may only be admitted if it '(a) "tends logically, naturally and by reasonable inference" to prove the issue upon which it is offered; (b) is offered upon an issue which

will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue.' [Citation.]" (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; see also *People v. Lopez* (2011) 198 Cal.App.4th 698, 715-716.)

Defendant also contends that common plan was not a material issue. Evidence of "uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible." (*Ewoldt*, *supra*, 7 Cal.4th at p. 406.) However, when the similarities of the plan are sufficient to establish a modus operandi, a strong inference of identity arises. (*People v. Jones* (2013) 57 Cal.4th 899, 925.) But this "requires the highest degree of similarity between the past and present crimes. 'For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."' [Citation.]" (*Id*. at p. 926, quoting *Ewoldt*, *supra*, at p. 403.) "'The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks.' [Citations.]" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 370.) We view the evidence in the light most favorable to the trial court's ruling. (*Ibid*.)

Here, the trial court found that the use of a getaway car and an accomplice was a unique circumstance which set it apart from the more common walk-up, rob, and run-away crime. Other

marks of similarity found by the court were the facts that both victims were Hispanic, alone in a similar neighborhood, 16 blocks apart, but sufficiently nearby to be similar, at approximately the same time of day during daylight hours (3:55 p.m. and 4:23 p.m.), and by the use of threat or use of force in both instances.

To explain his disagreement with the trial court's findings, defendant merely summarizes defense counsel's arguments at the hearing on the motion, arguments which the trial court rejected. Many of those arguments were based on facts which were not contained in the prosecutor's offer of proof or elsewhere in the record, such as the density of the population in the area of the two crime scenes and the similarity of the area to that between Skid Row and Chinatown (apparently referring to downtown Los Angeles). Counsel also asserted that the population of the two areas was approximately 30 percent Hispanic, but this alleged fact did not appear in the prosecution's offer of proof and was unsupported by the record. Thus the trial court rejected as speculative counsel's characterization of the two crime scenes, as well as defendant's representation regarding the demographics of the two areas. The trial court also disagreed with defendant's premise, observing that a 30 percent Hispanic population was not unusually large, and that in the 2002 case, defendant targeted a Hispanic victim in a different city, suggesting that targeting Hispanics was not coincidental. Defendant does not cite to anything in the record showing that the trial court erred in rejecting defendant's unsupported claims.

Defendant points to his counsel's argument that the getaway cars in the two crimes were of different makes and models, as well as the argument that all robberies involve a demand and force or a threat of force, and thus, that similarity in

the two cases were not distinctive. The trial court found that the use of a getaway car and an accomplice, when considered with the other similarities recited, showed a sufficient degree of similarity to admit the prior robbery as evidence of identity. We agree with this implied finding that the degree of distinctiveness of individual shared marks outweighed "'the *number* of minimally distinctive shared marks.' [Citations.]" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 370.) "To be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148.) Defendant's summary of defense counsel's argument fails to demonstrate that the court's findings fell outside the bounds of reason.

In addition, the record does not support defendant's claim that the 2013 robbery would consume an undue amount of time. Counsel based her argument below on the claim that there would be four witnesses. The trial court found that there would be no undue consumption of time, as the trial would take two days regardless, and the prosecutor said she would probably only call two witnesses, not the four on the witness list.

With regard to potential prejudice, the court found that because identity would be a highly contested issue, and as the facts of the 2013 robbery were not worse than the facts of the current case, the potential prejudicial effect was outweighed by its probative value. We agree. As respondent observes, the crimes were equally inflammatory. It was alleged that defendant struck the victim in the 2013 robbery and that he displayed a knife in the current case. "'Prejudice' in [Evidence Code] section 352 does not refer simply to evidence that is damaging to the defendant. Instead, "'[t]he 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to

evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*.'" [Citation.]" (*People v. Smith* (2005) 35 Cal.4th 334, 357.) A claim of mistaken identity was central to the defense, and the similarities in the times, places, targeted victims, and the manner that the two crimes were committed were clearly probative of defendant's identity. The trial court thus properly weighed the factors, and we cannot say that the court's exercise of discretion exceeded the bounds of reason.[8]

Moreover, it is defendant's burden not only to establish an abuse of discretion but also to demonstrate that the court's ruling resulted in a manifest miscarriage of justice. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566.) A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.) "It is well settled that claims of error in the admission of prior crimes evidence are evaluated under the [*Watson*] standard . . . [citations]." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 755, citing *People v. Welch* (1999) 20 Cal.4th 701, 749-750.)

Defendant contends that the record shows that this was a close case in which identity was the only issue. He adds that the

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[8] Defendant suggests that in balancing probative value against potential prejudice under Evidence Code section 352, the trial court should have considered the 2013 robbery to be too remote to be probative. Defendant did not raise remoteness below and provides no reasoned argument here on this issue. We do not consider undeveloped claims. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.)

identity evidence was weak, and the prosecution's inability to prove the use of a knife (the deadly weapon enhancement was dismissed before the case was submitted to the jury), made the 2013 robbery worse than the trial court anticipated. Defendant characterizes Cabral Salas's testimony as "shaky" and lacking in reliability, pointing out that Cabral Salas's estimated height, weight, and age of the would-be robber did not match that of defendant, and that Cabral Salas did not actually see defendant get into the blue Saturn. Such weak identity evidence, defendant argues, demonstrates that the 2013 robbery was prejudicial. Defendant also argues that the jury's requests for readback of testimony and instructions, and that the jury was deadlocked at one point, also illustrates the weakness of the prosecutor's case. Defendant includes a lengthy discussion of the trial court's inquiry into the misconduct allegations regarding Juror No. 7, arguing that this indicated that the guilty verdict resulted from undue pressure on the holdout juror.

We disagree with defendant's characterization and do not see this as a weak case. Despite the confusion regarding whether Cabral Salas saw a knife, and Cabral Salas's ability or inability to accurately estimate heights, weights and ages, his testimony otherwise seemed to be strong and reliable. Cabral Salas may not have explicitly seen defendant get back into the blue Saturn, as defendant argues, but he saw that defendant was previously driving the car and saw defendant get out of the car. Defendant got within eight feet of Cabral Salas, and as defendant followed him, Cabral Salas continuously looked over his shoulder back at defendant. Additionally, defendant was in the driver's seat of a blue Saturn when he was detained just one week after the crime,

the same day that Cabral Salas identified defendant's photograph from two photo arrays.

Defendant summarizes the length of deliberations, the juror questions and requests for readbacks, the jury's declaration of deadlock, and the accusation of misconduct against Juror No. 7 (the sole holdout and only African-American on the jury). Defendant then speculates that Juror No. 7 was pressured into acquiescing in the majority's verdict, despite her not having an "abiding conviction in her guilty verdict." "No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).) Furthermore, where, as here, the prosecution evidence was not weak, the length of deliberations, juror questions, and requests for readback can "'as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision.' [Citation.]" (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

We conclude that the trial court's ruling was not an abuse of discretion and that if the court had excluded evidence of the 2013 robbery, there would remain no reasonable probability of a different result. As defendant has failed to demonstrate an abuse of discretion or a miscarriage of justice under state law we do not reach his constitutional claim. (See *People v. Thornton*, *supra*, 41 Cal.4th at pp. 443-444.)

III. Remand to consider striking recidivist enhancements

Defendant asks that we remand this case for resentencing in light of Senate Bill No. 1393, which amended sections 667, subdivision (a)(1), and 1385, subdivision (b), to give the

sentencing court discretion to strike the five-year recidivist enhancement. Effective January 1, 2019, trial courts have discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, §§ 1, 2.) The parties agree that the statute applies to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Respondent, however, contends that the trial court's actions and statements at sentencing clearly indicated that it would not have dismissed the enhancements in any event, and thus remand is unwarranted.

Remand is not required where the sentencing record clearly indicates that the trial court "would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 [amended Three-Strikes law]; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 [amended firearm enhancement statute].) Respondent recites the trial court's reasons for imposing a third strike sentence of 25 years to life after denying defendant's motion to strike one of his prior serious felony convictions pursuant to section 1385. Those reasons included findings that defendant had committed crimes of violence including three robberies and a battery, had previously violated parole, had violated probation for a prior robbery, did not remain crime free of custody for more than four years, and had repeatedly "elected to be violent and terrorize the community by his conduct." In addition, finding four circumstances in aggravation and none in mitigation, the trial court revoked probation on defendant's other case, and executed

the previously suspended sentence of 10 years, to run consecutively.

Although the trial court's findings, its refusal to strike a prior strike conviction, and the reasons given for imposing consecutive sentences suggest that the court is unlikely to exercise its new discretion in defendants' favor, the court made no express comment which clearly indicated that it would not do so. Under such circumstances the better practice is to remand the matter for the limited purpose of allowing the trial court to consider whether to strike the enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.) Under the full resentencing rule, if the court decides to strike the section 667, subdivision (a) prior, it will be entitled to reconsider its other prior sentencing choices. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.)

IV. *Romero* motion

Defendant contends that the trial court abused its discretion when it denied his oral motion to strike his 30-year-old "juvenile" conviction, on the ground that he had just turned 18 when he committed the robbery.[9] (See *Romero, supra*, 13 Cal.4th 497.) Defendant reasons that the court's ruling was an abuse of discretion because the conviction was 15 years old, and defendant suffered no more felony convictions for over a decade.

Section 1385 gives trial courts the discretion to dismiss a three-strikes prior felony conviction allegation. (*Romero, supra,* 13 Cal.4th at pp. 529-530.) Our review of this exercise of discretion is deferential, and will not be disturbed unless the

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[9] Defendant had turned 18 eight months prior to committing the robbery in question.

ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162; *Romero*, at p. 530.) It is the defendant's burden to show that the trial court's decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.)

As defendant acknowledges, in exercising discretion under section 1385, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161; see § 1385.)

Defendant made the same points in the trial court as he makes here, and the trial court's explanation for rejecting them covers three pages of reporter's transcript. First, the trial court noted that the purpose of the Three Strikes law was to ensure longer prison sentences and greater punishment for those who commit felonies and have been previously convicted of serious or violent felonies. The court acknowledged that it was required to consider, in light of the nature and circumstances of the present felony and the prior serious or violent felony, defendant's background, character, and prospects, whether the defendant may be deemed to be outside the spirit of the Three Strikes law. The court found "that he is just the opposite." The court

considered defendant's youthfulness at the time that he suffered the original robbery conviction, but noted that he had been in the system since 2001, when a juvenile petition was sustained and defendant was placed at home on probation. The trial court also noted that it was shortly after that adjudication when, having turned 18 years old, defendant was convicted of robbery, sent to prison, released on parole, violated parole, returned to prison, and was paroled again in December of 2005, which demonstrated that defendant's time in custody was insufficient to cause him to change his behavior.

Defendant asserted below, as he does here, that he remained free from felony convictions for over a decade. The court pointed out that it was actually only four years that defendant had not been convicted of a crime of any significance. The court acknowledged that defendant was convicted of two insignificant misdemeanors between 2001 and 2013, but noted that in 2009, only four years after being paroled, defendant was convicted of battery, another crime of violence, and although it was a misdemeanor, defendant served 60 days in jail, suggesting some level of significance. Defendant was then on probation until 2010, and within three years he committed another robbery. The trial court noted that defendant had been sentenced on the 2013 case in the same court, and had then been given another opportunity before committing this crime. The trial court observed that it was the same behavior: robbery, not merely a theft-related crime where the victim is not present. That defendant elected to act violently and to terrorize the community with his conduct, exactly as he did in this case while still on felony probation. The court thus found that defendant did not remain free from any crime of violence for more than four years,

making it clear to the court that defendant's criminal behavior was ongoing, that he had not elected to change, and that he "is who he is." The court concluded that defendant was a violent human being, did not deserve the benefit of the court's discretion and was not within the spirit of *Romero*.

The trial court thus carefully considered all the relevant factors: "the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

Defendant asserts that a refusal to strike any serious felony offense committed by a teenager 15 years ago was arbitrary and capricious. We agree that it would have been an abuse of discretion to strike the prior conviction *solely* on that basis. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 812-813.) However, remoteness "is not significant" where the defendant "did not refrain from criminal activity during that span of time, and he did not add maturity to age"; nor is remoteness a factor where the defendant ""failed or refused to learn his lesson.' [Citation.]" (*People v. Williams, supra,* 17 Cal.4th at p. 163.) Here, since the trial court found such factors to be present, it did not act arbitrarily or capriciously in rejecting defendant's remoteness argument. We find no abuse of discretion in denying defendant's *Romero* motion.

V. Ability to pay fines and fees

Defendant claims that he is indigent, and asks that we vacate the $40 court operations assessment imposed pursuant to section 1465.8, subdivision (a)(1), as well as a $30 court facilities assessment imposed pursuant to Government Code section 70373. Defendant also asks that we order the trial court to stay

the $10,000 restitution fine that it imposed pursuant to section 1202.4, until such time as the People prove his ability to pay it.

Defendant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Duenas*), in which another division of this court held that constitutional considerations of due process and equal protection required reading into Government Code section 70373 and Penal Code section 1465.8 a procedure for obtaining a waiver of the assessments on the ground of inability to pay. (*Dueñas*, at pp. 1164-1169, 1172 & fn. 10.) In addition, the *Dueñas* court also held that although section 1202.4, subdivision (c) provides for consideration of defendant's ability to pay a restitution fine if it is imposed in an amount in excess of the minimum fine called for under subdivision (b)(1) of that section, due process required consideration of the defendant's inability to pay even if only the minimum fine is imposed. (*Dueñas*, at pp. 1164, 1169-1170, 1172 & fn. 10.) The court concluded that the trial court erred in refusing to consider the defendant's ability to pay the fine and assessments. (*Id*. at p. 1172 & fn. 10.)

Here, respondent contends that defendant has forfeited any claim that the trial court's imposition of assessments and the restitution fine violated due process, as he did not claim an inability to pay at sentencing or request a hearing in the trial court. Defendant responds that he has not forfeited his claim because the trial court's failure to consider his ability to pay was a legal error, not a discretionary error, and because it would have been futile to object before the trial court. Defendant adds that objection would have been futile because *Dueñas* was not decided until after he was sentenced, and that case represents a dramatic and unforeseen change in the law governing assessments and restitution fines.

We find no indication in the record that the trial court misunderstood the law regarding restitution fines at that time of sentencing, and defendant has not cited the record in support of this assertion. We thus presume that the court understood and applied the law correctly. (Evid. Code, § 664; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) Section 1202.4, subdivision (c) expressly permits a defendant to assert in the trial court an inability to pay a restitution fine imposed above the statutory minimum, and the statute so permitted prior to the publication of *Dueñas*.[10] The constitutional principle which was newly announced in *Dueñas* has been held to excuse a failure to object to the imposition of the *minimum* restitution fine of $300. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.) However, there was no dramatic or unforeseen change in the law governing the imposition of restitution fines in excess of the minimum. The statutory minimum restitution fine is $300. (§ 1204.4, subd. (b)(1).) Here, the trial court imposed a restitution fine of $10,000, which is $9,700 in excess of the statutory minimum. Defendant had the right to claim an inability to pay the fine, but failed to preserve his appellate challenge to the fine imposed. (*People v. Avila* (2009) 46 Cal.4th 680, 729; *People v. Frandsen* (2019) 33

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[10] At all times relevant, section 1202.4, subdivision (d) provided in part: "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1204.4, subd. (d); Stats. 2017, ch. 101, § 1.)

Cal.App.5th 1126, 1153-1154.) As it was defendant's burden to demonstrate an inability to pay the fine, and he did not do so, we presume that he has the ability to pay. (*People v. Avila*, at p. 729; § 1204.4, subd. (d).)[11]

As defendant has forfeited his objection to the restitution fine, only the $70 would be at issue if we ordered a remand for a hearing on defendant's ability to pay, and as defendant has the ability to pay a fine of $10,000, it is unlikely that he has an inability to pay an additional $70. Moreover, we can infer that defendant has an ability to pay the $70 from probable future prison wages. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397, citing *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) "The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment . . . ." (§ 2700.) Defendant was sentenced on the two cases to life in prison with a minimum of 45 years. Even if on remand, the trial court were to strike the 10 years in recidivist enhancements, his minimum term will be 35 years. Full-time prison wages range from a minimum of $12 per month to $56 per month depending on the prisoner's skill level. (Cal. Code Regs., tit. 15, § 3041.2.) As the Department of Corrections and Rehabilitation may garnish no more than 50 percent of those wages to pay a prisoner's restitution fine (§ 2085.5, subd. (a)), the remainder will be available for defendant to pay the $70 over his period of incarceration. These

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[11] In *Duenas*, the defendant had already established in the trial court with undisputed evidence that she was unable to pay court fees and fines. (See *Duenas, supra*, 30 Cal.App.5th at p. 1166 & fn. 2.)

circumstances lead us to conclude beyond a reasonable doubt that remand would be futile, and we decline to order such an exercise in futility. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court for it to exercise its discretion whether or not to strike the enhancements imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion the defendant shall be resentenced and an amended abstract of judgment prepared and forwarded to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT